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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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NO. PD-0880-16

IN THE COURT OF

CRIMINAL APPEALS OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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RONALD EDGAR LEE, JR.,
APPELLANT

V.

THE STATE OF TEXAS,
APPELLEE

APPELLANT'S BRIEF ON THE MERITS

On appeal from Cause Number 19309-B in the 104th District Court of Taylor County, Texas and Case Number 11-14-00198-CR in the Court of Appeals for the 11th Judicial District of Texas

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IDENTITIES OF PARTIES AND COUNSEL

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State of Texas, Appellee

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STATEMENT REGARDING ORAL ARGUMENT

Appellant has raised important questions of first impression in this Court and believes that oral argument would help clarify the issues presented in his petition for discretionary review. Therefore, he respectfully requests oral argument.

Although oral argument was not requested in Appellant's Petition For Discretionary Review, upon completing this Brief On The Merits it is apparent to counsel for Appellant that oral argument would be beneficial due to the complexity of the issue presented.

TO THE HONORABLE JUSTICES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, Ronald Edgar Lee, Jr., Petitioner in this cause, by and through his attorney of record, Paul W. Hanneman, and presents this brief on merits following this Court's grant of discretionary review, and would show as follows:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant was indicted in Cause No. 19309-B for Continuous Sexual Abuse of a Child and in the second count of the indictment, with Sexual Abuse of a Child (CR Vol. 1, p. 5). He entered a plea of not guilty, but on June 26, 2014, a jury found him guilty of Continuous Sexual Abuse of A Child under Section 21.02 of the of the Texas Penal Code. TEX. PENAL CODE ANN. §21.02 (West Supp. 2015), as charged in Count One of the indictment (CR Vol. 1, p. 33, 52). On June 27, 2014, the jury assessed the punishment at LIFE in the Institutional Division of the Texas Department of Criminal Justice and a $344.00 court costs, no fine. (CR Vol. 1, p. 52, 39). Appellant gave timely notice of appeal on July 25, 2014. (CR Vol. 1, p. 55). Appellant also filed a Motion for New Trial on July 25, 2014, CR Vol. 1, p. 56-58, which was denied on August 28, 2014. (CR Vol. 1, p. 63).

Petitioner challenged his conviction on appeal on two issues: Issue One was that the evidence was insufficient to prove the offenses as set forth in the indictment to-wit: that appellant committed two or more acts of sexual abuse against the alleged victim in Taylor County, State of Texas, and Discretionary Review was granted on Issue Two which is that the evidence at the trial was insufficient to prove appellant violated Texas Penal Code "Sexual Assault" Under Section 22.011 or "Aggravated Sexual Assault Under Section 22.021 two or more times, the State of Texas did not have territorial jurisdiction over the act of appellant in New Jersey. Nonetheless, the Eleventh District Court of Appeals affirmed Petitioner's conviction. Lee v. State, 11-14-00198-CR (Tex. App.-Eastland 2016).

This Court granted the petition for discretionary review on Issue Two on January 11, 2017. This brief is due on February 10, 2017, this brief is therefore timely filed.

GROUND FOR REVIEW

THE APPELLATE COURT'S HOLDING THAT EVIDENCE AT THE TRIAL WAS SUFFICIENT TO PROVE APPELLANT VIOLATED TEXAS PENAL CODE "SEXUAL ASSAULT" UNDER SECTION 22.011 OR "AGGRAVATED SEXUAL ASSAULT" UNDER SECTION 22.021 TWO OR MORE TIMES AND THAT, THE STATE OF TEXAS DID HAVE TERRITORIAL JURISDICTION OVER THE ACTS OF APPELLANT IN

NEW JERSEY IS CONTRARY TO LEGAL PRECEDENT AND CONTRARY TO A PLAIN READING OF SECTION 21.02.

GROUND FOR REVIEW
REVISED FOR CLARIFICATION:

THE APPELLATE COURT'S HOLDING THAT EVIDENCE AT TRIAL WAS SUFFICIENT TO PROVE APPELLANT COMMITTED CONTINUOUS SEXUAL ABUSE OF A CHILD (SECTION 21.02 TEX. PENAL CODE) BY PROOF OF A VIOLATION OF SECTION 22.021 TEXAS PENAL CODE "AGGRAVATED SEXUAL ASSAULT" TWO OR MORE TIMES COMMITTED BY APPELLANT IS CONTRARY TO LEGAL PRECEDENT AND CONTRARY TO A PLAIN READING OF SECTION 21.02.

STATEMENT OF FACTS

JNJ is the child victim in this case. Appellant was JNJ's stepfather. CR Vol. 4, p. 20. JNJ testified that, in June 2012, when JNJ was nine years of age, Appellant penetrated JNJ's sexual organ with his sexual organ. RR Vol. 3, p. 115; RR Vol 4, pp. 36-37. JNJ testified that this happened in the state of New Jersey. RR Vol. 4, pp. 27-38.

JNJ said that later, in October of 2012, after the family moved to Abilene, Texas Appellant penetrated her in the same manner as he had in New Jersey. RR Vol. 4, p. 51. JNJ told her mother, April Gonzales, about

the event: Ms. Gonzales took JNJ to the hospital. The police were called. RR Vol. 3, p. 131.

Detective Eric Vickers with the Abilene Police Department interviewed Appellant. Appellant originally admitted to Detective Vickers that he had sexually abused JNJ in Abilene, but he denied that he had sexually abused her in New Jersey or at any other time. RR Vol. 3, p. 133-States Exhibits 1 RR Vol. 4, p. 99-100. At trial, Appellant claimed that he had never sexually abused JNJ and that he was under duress when he told Detective Vickers that he had sexually abused JNJ in Abilene. RR Vol. 4, p. 83-84, pp. 89-92.

JNJ testified that Appellant had not committed any other acts of sexual abuse against her except for the one time in New Jersey and the one time in Abilene. RR Vol. 4, p. 38,49,50. These two incidents were the only incidents of sexual abuse on which any evidence was before the court.

The jury found Appellant Guilty of violating Texas Penal Code Section 21.02 by committing two or more acts of sexual abuse against JNJ, a child younger than 14 years of age, namely Aggravated Sexual Assault by causing penetration of the female sexual organ of JNJ with Appellant's male sexual organ and/or with his finger. The jury assessed his punishment at LIFE in the penitentiary. CR Vol. 1, p. 9, 39.

SUMMARY OF ARGUMENT

Evidence at trial of an act committed in another state which did not violate a Texas penal law at the time of its commission, did not provide sufficient evidence to fulfil the statutory requirement that the state must prove beyond a reasonable doubt a violation of certain enumerated Texas penal laws two or more times during a specified period of time. A plain reading of the statute, Texas Penal Code §21.02, requires that each act must be proven to have been a violation of one of 8 statutes enumerated in §21.02 at the time of its occurrence for that act to be used as one of the two or more acts required to constitute proof of Continuous Sexual Abuse of a Child.

Texas Penal Code Chapter 1, Section 1.04, Territorial Jurisdiction should not be read to allow conduct outside this state that was not a violation of the law of this state at the time the conduct was committed to retroactively become a violation of the law of this state.

GROUND FOR REVIEW (RESTATED)

THE APPELLATE COURT'S HOLDING THAT EVIDENCE AT THE TRIAL WAS SUFFICIENT TO PROVE APPELLANT VIOLATED TEXAS PENAL CODE "SEXUAL ASSAULT" UNDER SECTION 22.011 OR

"AGGRAVATED SEXUAL ASSAULT" UNDER SECTION 22.021 TWO OR MORE TIMES AND THAT, THE STATE OF TEXAS DID HAVE TERRITORIAL JURISDICTION OVER THE ACTS OF APPELLANT IN NEW JERSEY IS CONTRARY TO LEGAL PRECEDENT AND CONTRARY TO A PLAIN READING OF SECTION 21.02.

ARGUMENT

For clarification, the issue contained in the Ground For Review can be rephrased as follows:

THE APPELLATE COURT'S HOLDING THAT EVIDENCE AT TRIAL WAS SUFFICIENT TO PROVE APPELLANT COMMITTED CONTINUOUS SEXUAL ABUSE OF A CHILD (SECTION 21.02 TEX. PENAL CODE) BY PROOF OF A VIOLATION OF SECTION 22.021 TEXAS PENAL CODE "AGGRAVATED SEXUAL ASSAULT" TWO OR MORE TIMES COMMITTED BY APPELLANT IS CONTRARY TO LEGAL PRECEDENT AND CONTRARY TO A PLAIN READING OF SECTION 21.02.

Argument and Authority

When we review the sufficiency of the evidence to determine whether the State proved the elements of the offense beyond a reasonable doubt, we apply the *Jackson v. Virginia* standard. *Brooks v. State*, 323 S.W.3d

893, 895–96 (Tex. Crim. App. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under that standard, the appellate courts must consider all the evidence in the light most favorable to the verdict and, in doing so, determine whether a rational justification exists for the jury's finding of guilt beyond a reasonable doubt. *Id.* The trier of fact is the sole judge of the weight and credibility of witness testimony; therefore, on appeal, the courts must give deference to the factfinder's determinations. *Id.* If the record contains conflicting inferences, they must presume that the factfinder resolved such facts in favor of the verdict and defer to that resolution. *Id.*

In assessing the legal sufficiency of the evidence, the appellate courts have a duty to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime that was charged. *Williams v. State,* 235 S.W.3d 742, 750 (Tex.Crim.App.2007); *see Winfrey v. State,* 323 S.W.3d 875, 882 (Tex.Crim.App.2010).

Review is conducted by measuring the evidentiary sufficiency with explicit reference to the substantive elements of the criminal offense as defined by state law *Adames v. State*, 353 S.W.3d 854, 860, *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Appellant was charged with the offense of Continuous Sexual Abuse of a Child under Section 21.02 of the Texas Penal Code. TEX. PENAL CODE ANN. § 21.02 (West Supp. 2015). The Texas Penal Code provides,

in relevant part, that a person seventeen years of age or older commits an offense if, during a period that is thirty or more days in duration, the person does an act that is a violation two or more acts of sexual abuse against a child or children younger than fourteen years of age. *Id.* § 21.02(b). The term "sexual abuse" is defined in Section 21.02 to "any act that is a violation of one or more" of eight enumerated sexual offenses including Aggravated Sexual Assault under Section 22.021 of the Texas Penal Code. *Id.* § 21.02(c)(3), (4).

In count one of the indictment in this case, the grand jury charged that: … on or about the 31st day of October, 2012 and anterior to the presentment of this indictment, in the County and State aforesaid, RONALD EDGAR LEE, JR. did then and there during a period that was thirty (30) days or more in duration, to-wit: from on or about June 1, 2007 through October 31, 2012, when the said RONALD EDGAR LEE, JR. was seventeen (17) years of age or older, commit two or more acts of sexual abuse against [JNJ], a child younger than fourteen (14) years of age, namely Aggravated Sexual Assault by causing penetration of the female sexual organ of the said [JNJ] with RONALD EDGAR LEE, JR.'s male sexual organ, and/or Aggravated Sexual Assault by causing penetration of the female sexual organ of the said [JNJ] with RONALD EDGAR LEE, JR.'s finger.

The Appellant argues that evidence of an act alleged to have been committed outside the State of Texas, prior to Appellant ever entering the State of Texas or having any contact with the State of Texas, was insufficient to prove, beyond a reasonable doubt, the element of a "violation" of a Texas Penal law, to-wit: Aggravated Sexual Assault under Section 22.021. There could have been no "violation" (quoting the term used in the § 21.02) because Texas' law did not extend outside the State of Texas at the time of the commission of the act. Proof of two or more violations is an essential element of the offense charged under §21.02: Continuous Sexual Abuse of a Young Child.

It is not sufficient under Chapter 21, Section 21.02, that acts committed in another State fit the definition of the acts described under Section 22.011 or Section 22.021, the acts must be a "violation" of those penal laws per a plain reading of the language of Section 21.02. The acts set forth in the statute and defined in the Court's Charge to the jury cannot be violations of Texas penal laws unless Texas had jurisdiction over the person and subject matter at the time the acts were committed.

Our argument that the evidence is insufficient to prove a violation of Texas Penal Code Section 22.021 in New Jersey is based on two distinct parts:

1) The language of the statute requires that a “violation” must have occurred for an act to be used as one of the two offenses required to constitute continuous sexual assault. The evidence showed that at the time the acts of Appellant took place in New Jersey they were not a violation of the Texas statute.

AND

2) There is no precedent for the idea that Texas, by Statute, can extend its jurisdiction *post facto* and reach back in time to make acts which were not a violation at the time of their commission into a violation at a future time.

Therefore, it was impossible for the New Jersey acts of Appellant to be evidence of commission by him of an essential element of the offense for which he was convicted and the evidence at trial was wholly insufficient to prove an impossible act.

The evidence at trial was insufficient to prove that Texas penal law was violated at the time the act occurred in New Jersey. A plain reading of the statute’s use of the words “is a violation” shows that the enumeration of the statutes is not merely to set forth the acts described as proscribed

conduct but further requires that the proscribed conduct be a "violation" of that statute. The evidence at trial was that the act that occurred in New Jersey happened before Appellant ever came to Texas at a time when Texas had no jurisdiction over the act. It was undisputed that there were only two incidents of sexual misconduct by Appellant on which there was any evidence before the court, one in New Jersey and, later, one in Texas.

The defining statute says the act must be an act that "is" a violation of the Texas Penal law. A plain reading of the statute is that "is" does not mean an act that later "becomes" but simply an act that at the time of it's doing is a violation of one of the eight Texas statutes enumerated in the statute.

The Appellate Court relied on the following cases for precedent: *Kennedy v. State,* 385 S.W.3d 729, 732 (Tex. App. – Amarillo 2012, pet. ref'd), *See Bayless v. State,* No. 05-99-01978-CR, 2003 WL 21006915, at *1 (Tex. App. – Dallas May 6, 2003, no pet.), *Render v. State,* 316 S.W.3d 846, 857 (Tex. App. – Dallas 2010, pet. ref'd), *Jacobsen v. State,* 325 S.W.3d 733, 737 (Tex. App. – Austin 2010, no pet.), none of which addresses the language of the statute which requires conduct which "is a violation".

We argue that the evidence did not and could not provide a rational justification for the jury's finding of guilt beyond a reasonable doubt that the

evidence was insufficient to prove beyond a reasonable doubt that there were two violations of the Texas statute on Aggravated Sexual Assault.

The elements of the offense of continuous sexual abuse are as follows: during a period that is thirty or more days in duration, a person who is seventeen years of age or older commits two or more violations of acts of sexual eight enumerated penal statutes against a child or children younger than fourteen years of age.

Texas has jurisdiction over, among other things not relevant here, "an offense that a person commits by his own conduct or the conduct of another for which he is criminally responsible if . . . either the conduct or a result that is an element of the offense occurs inside this state." TEXAS PENAL CODE § 1.04(a)(1) (West 2011).

Texas has territorial jurisdiction over an offense if any part of the actus reus, or prohibited conduct, of the offense occurs within the State of Texas. *See* *Bayless v. State*, No. 05-99-01978-CR, 2003 WL 21006915, at *1 (Tex. App.—Dallas May 6, 2003, no pet.). The prohibited conduct under Section 21.02 of the Texas Penal Code is the violation of two or more of the eight listed acts of sexual abuse over a specified period of time.

The act described in the evidence in Mr. Lee's trial as having been committed by Appellant in New Jersey could not be a violation of Texas penal law at the time of the commission of the act because, it was

committed in New Jersey, a State of the United States in which the State of Texas has no Territorial Jurisdiction.

The evidence shows Texas had no territorial jurisdiction over the acts of Appellant in New Jersey. Those acts cannot be violations of the penal law of the State of Texas. The evidence wholly fails to provide any rational evidence to prove territorial jurisdiction over Appellant's acts in New Jersey under any of the provisions of Texas Penal Code Sec. 1.04, Territorial Jurisdiction.

The Appellate Court erred by misapplying precedent regarding territorial jurisdiction cases to Appellant's issue of the sufficiency of the evidence.

By applying precedent which does not apply to the issue raised, the lower appellate court has designated for publication a case which would establish a new rule applying Texas Territorial Jurisdiction to acts done out of state retroactively and has incorrectly applied this rule to find proof at trial of an essential element of the statute without examination of the language of the statute and contrary to the express provisions of the statute.

Does the conduct in New Jersey become a conduct element in Texas when a defendant commits conduct in Texas at a later time that is separate and distinct from the New Jersey conduct?

We find no precedent for the proposition that the State of Texas can go back in time to prosecute a defendant for such acts.

The State's reliance on *Meraz v. State* and *Render v. State,* is misplaced in that neither *Meraz* nor *Render* address a case where the two or more separate criminal offenses occurred in separate states. *Meraz v. State,* 415 S.W.3d 502 (Tex. App. - San Antonio 2013, pet. Ref'd), *Render v. State,* 316 S.W.3d 846 (Tex. App. - Dallas 2010, pet. Ref'd).

The decision in *Meraz* goes to the issue of venue, not territorial jurisdiction and not the issue before this court of whether a violation of the Texas Penal Code had been committed in a state other than Texas. *Meraz v. State,* 415 S.W.3d 502 (Tex. App. - San Antonio 2013, pet. ref'd).

In *Meraz* the appellate court was talking about a case in which the evidence was that the appellant had committed two or more different acts that section 21.02 defines as means of committing the offense of Continuous Sexual Abuse of a Young Child or Children which were alleged to have been committed in separate counties of Texas, not separate states. *Meraz* is not germane to the issue of whether a “violation” of the Texas Penal Code can be proven beyond a reasonable doubt when, as in Mr. Lee's case, all of the elements of the alleged violation were shown by all of the evidence to have occurred in another state, New Jersey, before Texas

had any contact with the appellant and before any contact with the State of Texas was shown.

The State also relied in its appellate argument on *Render v. State,* 316 S.W.3d 846 (Tex. App. - Dallas 2010, pet. Ref'd), a case having to do with the offense of Continuous Sexual Abuse of a Young Child, which was cited in *Meraz v. State*. In its discussion of how several violations of an offense enumerated in Section 21.02 of the Texas Penal Code (which presumably occurred in Texas only, and not in any other state), were a means of committing a single offense of Continuous Sexual Abuse and not as two or more separate criminal offenses, the 5th District Court of Appeals' opinion states; that 21.02 “creates a single element of a 'series' of sexual abuse”. The opinion refers to each element as a 'violation'.” A “series” of “violations” becomes one single “element”. *Render,* at 857. See also *Richardson v. United States, 5*26 U.S. 813, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999), cited in *Render* at 857. Further, in its discussion of *Richardson* the Court uses the terms “violations” and “crimes” interchangeably. *Render* at 857. So, what “crime” or “crimes” did Appellant commit in New Jersey? Did he violate one of the enumerated sections of the Texas Penal Code in New Jersey? He clearly did not.

The primary issue before the Dallas Court of Appeals in *Render* was the issue of Jury Unanimity in a continuous sexual abuse case. The Render

decision may be easily misread, but does not apply to the issue before us here, however, we stress that in Render the Court does state that "violations" must be proven. *Render v. State,* 316 S.W.3d 846 @ 857.

Jacobsen v. State was decided in the month before Render by the Austin Court of Appeals. It, too, is a jury unanimity case challenging the relevant provision of the Continuous Sexual Abuse of a Child statute's constitutionality. The Austin court also uses the term "violation" as part of the definition of the offense of Continuous Sexual Abuse of a Child under §21.02..

> "…section 21.02 defines the offense of continuing sexual abuse in terms of multiple violations of the other penal laws"

Jacobsen v. State, 325 S.W.3d 733, 738 (Tex. App., 2010).

Both *Jacobsen* and *Render* cite the Federal case of *Richardson v. United States,* another "juror unanimity" case. Under 21 U.S.C. §848 a person is forbidden from "engaging in a continuing series of violations" of drug statutes. In delivering the opinion of the court Justice Bryer stated:

> "The words 'violates' and 'violations' are words that have a legal ring. A "violation" is not simply an act or conduct; it is an act or conduct that is contrary to law. Black's Law Dictionary 1570 (6th ed. 1990)."

Richardson v. United States, 526 U.S. 813, 818 (1999).

The use of the word "violation" in Section 21.02 has a legal meaning. The act had to be a violation: contrary to the law of the State of Texas, at the time of the act for the State to make it fit into the language of 21.02.

Another juror unanimity case relied on by the Court of Appeals in rendering its opinion here is *Kennedy v. State,* 385 S.W.3d 729(Tex. App., 2012). We do not argue with it nor any of the cases that the individual violations that make up the series of acts which must be proven for conviction under 21.02 are not individual elements of the offense. We contend only that the violations must be proven in order to sustain a conviction.

The State relies on *Rodriguez v. State,* 146 S.W.3d 674 (Tex. Crim. App. 2004), a Capital Murder case, to support the statutory principal that the State of Texas has jurisdiction over a matter under Tex. Penal Code Ann. §1.04 (a) (West 2014) when "either the conduct or a result that is an element of the offense occurs inside this state", Tex. Penal Code Ann. §1.04 (a)(1)(West 2014) In Mr. Lee's trial the evidence of any conduct that occurred in the New Jersey incident clearly did not happen in Texas, no result of the New Jersey conduct by the evidence was shown to have

occurred within the State of Texas. That conduct occurred approximately four months before Mr. Lee even came to Texas.

In *Rodriguez* elements of Capital Murder were partly committed in Texas (kidnapping) and then culminated in Mexico (murder). The offense of Capital Murder began in Texas and ended in Mexico. The Capital Murder statute is also distinguished from § 21.02 in that it specifically limits conviction to murder committed "in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation or terroristic threat under Section 22.07(a)(1),(3),(4),(5), or (6) of the Texas Penal Code." [emphasis added]

The state also attempted to draw a parallel to the Texas Capital Murder Statute, using another section of the statute Texas Penal Code Section 19.03. In doing so, the State ignores the difference in the language of the statutes and the different meaning of that language. At Section 19.03 (a)(7)(B) the Texas Capital Murder statute defines one form of Capital Murder as having been committed when a person "commits murder as defined under Section 19.02(b)(1) and: … (7) the person murders more than one person: ...(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct;" [emphasis added]. The Continuous Sexual Abuse of Young Child or Children statute provides that a person commits an offense if:

> (1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age."
>
> Tex. Penal Code §21.02

The requirements of "in the course of committing" another listed felony and "committed pursuant to the same scheme or course of conduct" are part of the elements of those forms of Capital Murder, but have nothing to do with the language of §21.02 and comparison of the two different statutes can result in a spurious conclusion.

In the Capital Murder statute murder committed in the course of committing or attempting to commit terroristic threat must be committed "under" Texas Penal Code Section 22.07 (a)(1),(3),(4),(5), or (6) to fit the definition of those elements.

The Continuous Sexual Abuse of Young Child or Children statute differs substantially from the language of the Capital Murder statute by specifically requiring that, by definition, two or more acts of sexual abuse must be a "violations" of one of eight (8) enumerated Texas Penal Code statutes, setting forth the specific Texas Penal Code sections of each statute. In this case the relevant portions are:

> "(c) For purposes of this section, 'act of sexual abuse' means any act that is a violation of one or more of the following penal laws:...
>
> …(4) aggravated sexual assault under Section 22.021;..."

Tex. Penal Code §21.02(c)(4)

The common meaning of the word "violation" is "infringement or breach, as of a law, rule, right, etc." The root word "violate" means "to break (a law, rule, promise, etc.); fail to keep; infringe on." Webster's New World Dictionary of the American Language, David B. Guralink, Simon and Schuster, 1986.

The Capital Murder statute, contrary to §21.02, does not require that the actor violate a section of the Texas Penal Code.

The evidence presented in Mr. Lee's trial, when reviewed in a light most favorable to the verdict, could not be found by any rational trier of fact to have proven beyond a reasonable doubt the essential elements of the crime as set forth in the indictment nor in the jury charge nor in a hypothetically correct jury charge in this case.

In Mr. Lee's trial, the government not only failed to prove that Mr. Lee's actions in New Jersey were a violation of one of enumerated Texas Penal Code provisions, it failed to prove that the act of the defendant in New Jersey was a violation of New Jersey law nor of any law.

Another Capital Murder case which is erroneously applied by the State in its argument is *Bayless v. State*, 2003 Tex. App. LEXIS 3852 (Tex. App. Dallas May 6, 2003, no pet.)

In *Bayless*, the appellant appealed her plea-bargained Capital Murder conviction. Her appeal was based upon several motions she had filed in the trial court challenging the indictment *Bayless* p.3. Her theory was that in a case where the evidence showed she caused the death of two individuals, one in Texas and one in Kansas, during different criminal transactions but pursuant to the same scheme and course of conduct, the indictment should have been quashed because Texas had no jurisdiction over the Kansas murder. The appellate court rejected Ms. Bayless' theory and agreed with the State's argument presented in its brief because:

"The State of Texas has jurisdiction over an offense that a person commits by her own conduct or the conduct of another for which she is criminally responsible if either the conduct or a result that is an element of the offense occurs in this state. TEX. PEN. CODE ANN. § 1.04(a)(1) (Vernon 1994)" *Bayless* at p. 2,3

"The Texas Penal Code provides that a person commits capital murder if she commits murder as defined by Tex. Penal Code Ann. § 19.03(a)(7)(B) and murders more than one person during different criminal transactions but pursuant to the same scheme or course of conduct." *Bayless* at p. 3

The Penal Code does not say that the person must violate the Texas murder statute but only that the person commit a murder as defined by § 19.02(b)(1): "intentionally or knowingly cause the death of an individual." (along with the condition that such conduct may be part of a different

criminal transaction but must be pursuant to the same scheme or course of conduct).

It is important to note also that in the "Overview" notes proceeding the LexisNexis rendition of Bayless states that:

> "The State alleged that defendant, acting together with others, caused the death of one victim in Texas, and caused the death of a second victim in Kansas." " [emphasis added]"

Bayless, p. 1, which would lead one to believe that Bayless started in Texas and happened after the murder in Kansas all pursuant to the same scheme or course of conduct.

It is troubling also that nowhere in the Capital Murder statute does Texas clarify by whose statutes, if any; Ms. Bayless' act of murder must be defined, Texas' or Kansas'? Was she convicted or charged under Kansas Law? Was it a substantially similar law to Texas' law? The court's opinion does not say. Bayless is a case that was plea bargained in the trial court and so we would not expect to see much detailed information about the facts and circumstances of the case.

Appellant's, Mr. Lee's, conduct in New Jersey did not occur in Texas. A result (such as death, a physical impact, etc.) did not occur in Texas.

Clearly, at the time of the conduct Texas did not have jurisdiction and a "violation" of the enumerated statute did not occur.

As the ruling of the Third District Court of Appeals on the issue of Territorial Jurisdiction in the YFZ Ranch cases state, it is not clear whether the State must prove territorial jurisdiction beyond a reasonable doubt or by a preponderance of the evidence, citing *Torres v. State,* 141 S.W.3d 645, 654 (Tex.App.-El Paso 2004, *pet ref'd*). In both YFZ Ranch cases the court ruled that the evidence was sufficient to find the sexual assault charged occurred in Texas beyond a reasonable doubt. *Jessop v. State,* No. 03-10-00078-CR, 368 S.W.3d 653, 663 (Tex.App., Austin-2012), *Jeffs v. State*, No.03-10-00781-CR pp. 9,10 (Tex.App. -Austin 2012).

Whether the burden of proof is by a preponderance of the evidence or beyond a reasonable doubt, the evidence wholly failed to prove up jurisdiction over Appellant's acts in New Jersey.

Comparison to the Language of Other Texas Statutes

What did the Texas legislature mean when it used the term "violation"? What is the clear meaning of the statute? A survey of other sections of the Penal Code with similar provisions may be helpful.

Two other Texas criminal offenses start with the word “Continuous.” They are Continuous Violence Against the Family and Continuous Trafficking of Persons. They are similarly worded.

Tex. Penal Code § 25.11, Continuous Violence Against the Family provides:

> "(a) A person commits an offense if, during a period that is 12 months or less in duration, the person two or more times engages in conduct that constitutes an offense under Section 22.01 (a)(1) against another person or persons whose relationship to or association with the defendant as described by Section 71.0021(b),71.003, or 71.005, Family Code.”

Tex. Penal Code §25.11(a)

Tex. Penal Code §20A.03, Continuous Trafficking of Persons says it almost identically:

> (a) A person commits an offense if, during a period that is 30 or more days in duration, the person

engages two or more times in conduct that constitutes an offense under Section 20A.02.

Tex. Penal Code 20A.03(a)

Both §25.11 and §20A.03 refer to conduct described by the statutes which make a single occurrence an offense (§22.01 and 20A.02, respectively). Both of these statutes, in delineating what constitutes the offense of "Continuous Violence Against the Family" or "Continuous Trafficking of Persons", use a reference to conduct described in the single occurrence statute and not to a "violation" of that statute.

By making the "conduct" a part of the offense, the Legislature distinguishes the element of this defined conduct from such elements set forth in other statutes as "previously convicted under this section," "in violation of this chapter" or "that is a violation of one or more of the following penal laws".

The Texas Penal Code provisions providing for enhanced penalties for repeat and habitual offenders in first, second and third degree felonies require by their language that before an enhanced punishment range applies it must be shown that the defendant has been "previously been finally convicted" of another felony (other than a state jail felony) Tex. Penal Code §12.42. The statute does not say whether or not the previous felony

conviction can be from another state, but case law says that a prior foreign conviction for an offense containing elements substantially similar to the elements of an offense listed under PC §12.42(c)(2)(B) may be used to enhance punishment in Texas under PC §12.42(c)(2). *Ex parte White,* 211 S.W.3d 316 (Tex. Crim. App. 2007); *Wagner v. State,* No. 14-07-906-CR (Tex. App. - Houston [14th Dist.] March 31, 2009) (not for pub.)

In *Prudholm v. State,*274 S.W.3d 236 (Tex. App. - Houston [1st Dist.] 2008), pet. ref'd, a California felony conviction for sexual battery was found to be not substantially similar to any Texas felony offense and therefore was unavailable for enhancement. There was no evidence presented in Mr. Lee's trial about any New Jersey law.

A defendant charged with Evading Arrest or Detention faces a Class A misdemeanor offense,

> "…except that offense is:
>
> (1) a state jail felony if the actor has been previously convicted under this section*; ...*"

Tex. Penal Code § 38.04

Clearly the legislature meant a violation of Section 38.04 that resulted in a previous conviction only and that no other violation of any other Penal

Code section and no other violation of any statute of any foreign jurisdictions can be used to enhance.

Distinguish the Legislature's draftsmanship contained in Tex. Penal Code Sec. 31.09, "Aggregation of Amounts Involved in Theft." That section states:

> "When amounts are obtained in violation of this chapter pursuant to one scheme or continuing course of conduct, whether from the same or several sources, the conduct may be considered as one offense and the amounts aggregated in determining the grade of the offenses." [emphasis added]

Tex. Penal Code Ch. 31, §31.09

So, a theft can be one offense from a Class C misdemeanor to a first-degree felony by aggregating amounts obtained by theft pursuant to one scheme or continuing course of conduct, but ONLY if the amounts are obtained in "violation" of Chapter 31 of the Texas Penal Code. Our interpretation of that is that a theft in New Jersey would not be available for aggregation under the statute.

Here, there was no evidence that Mr. Lee was convicted under New Jersey law by their statute for, nor that he violated the enumerated Texas statute in New Jersey, conviction or no conviction.

There are many other Texas statutes that "enhance" punishment, too many to go into here.

Further Authority

Recently this court stated:

"It is the obligation and responsibility of appellate courts "to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime that was charged." *Williams v. State,* 235 S.W.3d 742, 750 (Tex.Crim.App. 2007). Furthermore, "[i]f the evidence at trial raises only a suspicion of guilt, even a strong one, then that evidence is insufficient [to convict]." *Urbano v. State,* 837 S.W.2d 114, 116 (Tex.Crim.App.1992), *superseded in part on other grounds, Herrin v. State,* 125 S.W.3d 436, 443 (Tex.Crim.App.2002). *Winfrey v. State,* 323 S.W.3d 875 (Tex. App. 2010)

This court had also said in Williams:

> " In addressing the sufficiency of evidence to prove [the criminal charge] it is not enough to provide the jury with a

> set of legally correct definitions and then simply turn them loose and accept whatever they decide."

Williams at p. 75.

CONCLUSION

By a plain reading of the Penal Code Section Mr. Lee was convicted under, the State's evidence must show a violation of one more of the enumerated sections in addition to the one violation the jury found to have been committed in Texas. The State did not prove that Mr. Lee committed a violation of any of those sections while in New Jersey, it was impossible. Texas did not have jurisdiction.

As there was only evidence of two separate acts of conduct that were brought into question, one in Texas and one in New Jersey, a rational trier of facts could; under the laws properly applied; only find Mr. Lee guilty of one violation, the act committed in Texas, no matter how much deference is given to the jury's decision.

Even the State in its argument in its brief before the 11th Court of Appeals agrees that, standing alone, the Appellant's acts in New Jersey did not violate the Texas Penal Code.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that his conviction in the above-entitled and numbered cause be reversed and that the case be remanded to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

By affixing my signature above, I hereby certify that a true and correct copy of the foregoing APPELLANT'S BRIEF ON THE MERITS, was delivered via the United States Postal Service to:

James Eidson,
Criminal District Attorney
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on February 10, 2017.

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Certificate of Compliance

I certify that this Appellant's Brief On The Merits is a computer-generated document, and according to the word count function, this document contains 7,145 words, typed in a 14-point font except for page numbers that are typed is 12-point font.

Sincerely yours,

Paul W. Hanneman